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IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT

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IN THE

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No. 69-5001

LYMAN A. MOORE,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether, during petitioner's trial for murder, any item of exonerating or material evidence was kept from petitioner.
2. Whether the introduction into evidence of a sixteen gauge shotgun deprived petitioner of a fair trial where there was no conclusive evidence as to what gauge shotgun killed the victim.
3. Whether prospective jurors were excused for cause in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510.
4. Whether, because of ambiguities in the holding, *Witherspoon* v. *Illinois*, 391 U.S. 510, should be reconsidered or clarified.

STATEMENT OF THE CASE

On April 25, 1962, at approximately 10:00 P.M., Lyman Moore, petitioner herein, and a companion were drinking in a tavern owned by Bernie Zitek in the village of Lansing, Illinois. Moore began using profane language and, as a consequence, Zitek ejected him from the premises (R. 474-477).[1] Petitioner's companion was a dark-haired man, wearing a mustache and described as being about five feet ten inches tall (R. 509). Present at this time were Patricia Hill, a waitress, and approximately seven other customers. The petitioner was positively identified by Mrs. Hill as the ejected patron (R. 475). One hour later the petitioner returned to the tavern with a shotgun. He approached the bar, aimed the gun at Zitek and fired. The blast struck Zitek in the chest, killing him (R. 482-484). As petitioner fired the shot he was again observed by Patricia Hill, who later positively identified him as the murderer (R. 484). He was also identified by another eyewitness, Henley Powell (R. 525-526). The lighting conditions in the bar were good, and Mrs. Hill was only six feet from the petitioner (R. 483, 486).

After killing Zitek, petitioner fled the premises, pursued by Henley Powell (R. 527). Powell's pursuit ended when he was warned by petitioner not to come any further or he too would be shot: "Then he started hollering at me and says, 'Don't come any further or I'll shoot you too.'" (R. 529).

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1. "R" refers to the original transcript of proceedings at petitioner's trial.

Two days later (April 27, 1962), at a different tavern known as the Ponderosa Tap, a man known as "Slick" bragged to one Virgle Sanders that he had shot a bartender in Lansing (R. 587). Sanders identified petitioner at trial as the person he spoke to in the Ponderosa Tap (R. 578-579). William Joyce, the bartender at the Ponderosa, identified petitioner as the person with whom Sanders conversed in the tavern on April 27, 1962 (R. 555). Petitioner's companion on that occasion was "another fellow with dark hair and a mustache" (R. 561). Petitioner told Sanders and Joyce that he and his companion needed a ride to Harvey, Illinois; and Joyce accomodated, arranging for Bob Fair, owner of the Ponderosa Tap, to give petitioner a lift (R. 562-564). Bob Fair gave petitioner and his companion a ride to Harvey (R. 603). Fair's description of petitioner's companion matched that given by William Joyce and Patricia Hill (R. 603) and Fair further indicated that this individual's name was Barbee (R. 603, 605-606). During the trip to Harvey either Moore or Barbee—it is not clear from the record which—said "well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

On October 31, 1962, a Chicago police officer was on patrol when the occupants of a 1957 Ford automobile fired a shot and then fled from the car (R. 623-624). The car was staked out and a search of the area was conducted. A fully loaded 16 gauge shotgun was found in the back seat (R. 630). Registration papers found in the car indicated ownership in Jerry Barbridge. Other papers found in the car bore the signature of Jerry Barbee (R. 654). Later, while the car remained under surveillance, two men approached it and started to enter.

One was Lyman Moore; the other a dark-haired man wearing a mustache—Jerry Barbee (R. 684, 689). Both were arrested.

Petitioner's defense was alibi and he produced two witnesses to that effect. The first, Alex Koxhallari, was a bartender at a suburban country club (R. 746). He testified that petitioner was paid for working as a cocktail waiter on the evening of April 25, 1962. On cross-examination it was established that the witness had made a prior statement wherein he stated that he didn't remember if petitioner had been at the club that night (R. 757-760). Herbert Anderson, the manager of the country club (R. 765), testified that petitioner was an employee of the club but was unable to say that he had seen Moore on the night of April 25, 1962 (R. 773-777).[2] The only other defense witness was Donald O'Brien who was playing cards in the Zitek tavern at the time of the murder (R. 788). He testified that petitioner was not the man who was ejected from the tavern by the deceased (R. 793). Donald O'Brien was drunk at the time of the killing (R. 865, 878).

The jury found the petitioner guilty and recommended the death penalty (R. 1003). In a hearing on aggravation and mitigation the petitioner's efforts to reduce his penalty failed because of, *inter alia*, his five prior felony convictions (R. 1010-1012):

(1) 1946, larceny, one to five years;

(2) 1949, larceny, one to ten years;

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2. Petitioner unsuccessfully offered the same alibi defense in an earlier trial for a different armed robbery. See People v. Moore, 35 Ill. 2d 399, 406, 220 N.E. 2d 443 (1966), cert. den. 389 U.S. 861.

(3) 1957, bank robbery, seven years;
(4) 1957, Dyer Act, two years;
(5) 1962, armed robbery, twenty to forty years.

The sentence of the court was death (R. 1017).

Subsequently petitioner filed a petition under the Illinois Post Conviction Hearing Act (Ill. Rev. Stats. 1969, Ch. 38, Art. 122) and an evidentiary hearing was conducted. There Virgle Sanders was asked for the first time whether he had given a statement to the police and Sanders readily admitted that he had (R.P.C. 121). In this statement given April 30, 1962 Sanders said that he had met the petitioner six months prior to the conversation at the Ponderosa Tap. Sanders could not have met the petitioner when he said he did because Moore was serving a federal prison term at the time (Pet. Ex. No. 2; A. 354).[3] Moreover, one William Thompson, who was acquainted with a local resident named "Slick," told the police that Lyman Moore did not resemble the man known to him as "Slick" (R.P.C. 39, 63, 76, 84).[4] A bartender who also knew "Slick" told the police that he could identify "Slick" but was never called for that purpose (R.P.C. 38). These facts were not known to the defense at the time of trial. Neither were they known to the prosecution, and no one ever requested their production (R.P.C. 204, 347). The prosecutor's entire file was made available to defense counsel at the time of trial (R.P.C. 201).

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3. "A" refers to the Abstract of Record filed by petitioner in the Supreme Court of Illinois.

4. "R.P.C." refers to the original transcript of petitioner's post-conviction hearing.

Henley Powell testified at the trial that at the time of the crime he could see the front door of the tavern when Moore walked in with a weapon (R. 526). Officer Koppitz testified that a sketch he made showed Mr. Powell sitting in a northeast direction (R.P.C. 269)—away from the door—but also stated that it didn't matter because all of the people sitting at the table had an excellent view of the entire crime (R.P.C. 269). Further, he said "My diagram tells which way the people were seated, not which way they were looking" (R.P.C. 273). At the trial, the defense never requested any information from Officer Koppitz when he testified. His diagram (Pet. Ex. No. 5; A. 357, 358) was not in the prosecutor's file nor did the defense see it at trial.

The trial judge ruled that the defense had failed to meet its burden of proof and had not shown any suppression of evidence or any use of false testimony (R.P.C. 379-381).

On appeal the denial of post-conviction relief was affirmed by the Supreme Court of Illinois. Certiorari was granted on June 28, 1971.

SUMMARY OF ARGUMENT

The issues in this case are grounded upon allegations that the prosecution knowingly suppressed various items of material evidence and thus deprived the petitioner of a fair trial in violation of the due process clause of the fourteenth amendment.

These allegations are completely unsubstantiated by the record of the trial or by the record of the later proceedings upon petitioner's request for post conviction relief. Contrary to petitioner's argument, the complete record clearly establishes the State's compliance with the standards enunciated by this Court in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The petitioner's trial was fair and completely satisfies the requirements of due process.

And further, the admission into evidence at trial of the sawed-off sixteen gauge shotgun which had been in the petitioner's possession at the time of his arrest was perfectly proper and consistent with the established practice in Illinois and in several other jurisdictions. There is no error.

Neither was there any constitutional violation in the selection of the jury which tried the petitioner. The record reflects that the voir dire examination of prospective jurors complied with the apparent standards of *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) and violated no substantial right of the petitioner. In view of the absence of any infringement of the petitioner's federal constitutional rights, the respondent requests this Court to affirm the decision below.

ARGUMENT

I

THERE WAS NO CONCEALMENT OF MATERIAL OR EXONERATING EVIDENCE BY THE STATE.

Petitioner contends that there was an unconstitutional concealment of six items of exonerating evidence at trial. The facts allegedly concealed are as follows:

1. Virgle Sanders gave a written statement to the Lansing Police which stated that he first met the man known as "Slick" in Wanda and Del's tavern about six months prior to the murder.

2. Delbert Jones, the owner of Wanda and Del's told the police that he could identify "Slick" but was never called for that purpose.

3. Soon after Virgle Sanders supplied the name "Slick" to the Lansing Police, a suspect named James E. "Slick" Watts was apprended and photographed.

4. William Thompson, who was acquainted with a man named "Slick" failed to identify the defendant as that man.

5. After the passage of twenty-five months Virgle Sanders saw Lyman Moore at trial and observed that the man he knew as "Slick" was 30 or 40 pounds heavier than the defendant.

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have shown that Henley Powell was seated with his back to the entrance through which the defendant passed.

Undoubtedly; any individual circumstance or set of circumstances which exculpate or tend to diminish the quality and weight of the prosecution's case can be said to be relevant and can not be knowingly withheld from the

defense. However, broad generalizations on criminal discovery are of little aid in delineating the dimensions of due process in any particular case. It is imperative to keep in the mind this Court's mandate in this regard:

> We now *hold* that the suppression by the *prosecution* of evidence favorable to the accused upon *request* violates due process where the evidence is *material* . . ."

It is against the above standard that the prosecution's conduct in the instant case must be measured.[5]

The claim by petitioner that he was somehow improperly denied access to the prior statement of a witness is particularly ill-conceived. During trial petitioner's counsel asked several witnesses if they had given statements to the police. (R. 506, 538, 611). Every witness who had given such a statement admitted doing so and the statement was tendered. (R. 507, 531, 606). It is significant that the witness Sanders was *not* asked at trial if he had given a statement to police. Moreover, on the very first occasion when the question was put (at the post-conviction hearing), the witness readily admitted giving a statement to the police and the statement was promptly tendered to petitioner. (R.P.C. 121).

The record below also shows that the Assistant State's Attorney at trial displayed his entire file to the defense (R.P.C. 201). Thus any information which the petitioner now claims material was not in the direct possession of

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5. Brady v. Maryland, 373 U.S. 83, 88; United States ex. rel. Felton v. Rundle, 410 F. 2d 1300, 1306 (3rd Cir. 1969); United States ex rel. Fein v. Deegan, 410 F. 2d 13 (2d Cir. 1969), cert. den. 395 U.S. 935; Goetsch v. State, 45 Wis. 2d 285, 172 N.W. 2d 688 (1969); Peoples v. Hocker, 423 F. 2d 960 (9th Cir. 1970).

the prosecutor at trial. Since there is no claim of knowing suppression by the prosecutor of any evidence, the issue devolves to whether it is the obligation of a prosecuting attorney to ferret out every conceivable piece of potentially impeaching evidence that may be contained in police files. The promulgation of such a rule is neither realistic nor necessary for the fundamental fairness due every defendant. A major murder investigation may involve scores of fruitless leads. The search for the phantom "Slick" in the present case is but an example. It is singularly naive and unfair to impose upon prosecutors the responsibility to interrogate police officers in an effort to elicit facts which when viewed in hindsight might have a marginally favorable bearing on the conduct of the defense.

Unquestionably no prosecutor may engage in knowing suppression of evidence. However, the Constitution and the proper administration of criminal justice demand of the prosecution good faith and a quest for truth. They do not require an inquiry into all the areas of police investigation with an eye toward preventing possible inadvertent and immaterial omissions.

Admittedly police misconduct resulting in the suppression of material evidence even without the prosecutor's knowledge cannot be condoned. This, however, has not been shown to be the case here. Moreover, a state post-conviction proceeding, designed for just such an inquiry, produced no contrary conclusion.

It is submitted that there must be a showing of intent or knowledge before an unconstitutional suppression takes place. The underlying standard of conduct at trial must be fundamental fairness. Defendants cannot hope to obtain reversals upon subsequent findings of minutiae in

police files. Virtually every investigatory file will contain some fragmentary evidence which may cast doubt on the perceptive abilities of witnesses. Very often such files will also reveal the existence of persons who may have been suspected of involvement at one time. But in the course of investigation facts are uncovered which absolve some parties and further implicate others. In the gradual shift from investigation to accusation the focus of guilt sharpens to include only the very few. In some cases the sifting process rejects all but one. Here, the overwhelming evidence established Lyman Moore as that person.

When the decision is made to prosecute, the State's Attorney has usually received all relevant evidence: both inculpatory and exculpatory. Occasionally it will happen that minor items of evidence will not be turned over simply because the police view them as immaterial. Neither common sense nor the Constitution require a complete and detailed accounting of all police work on a case. The defense has no right to such information and has cited no case to substantiate such a claim.

Particular emphasis has been laid on the fact that Virgle Sanders, unknown to defense counsel, informed the Lansing Police that he had first met the defendant about six months prior to the murder. Petitioner claims that this is highly impeaching and exculpatory. The State cannot agree.

Sanders was demonstrably in error since Lyman Moore was serving a federal prison term at the time. At the worst, it simply shows that Virgle Sanders, like many people, is not adept at estimating time. The period of six months was only a guess. At the post-conviction hearing defense counsel called Virgle Sanders' attention

to the incident at the Ponderosa Tap two days after the murder. Sanders had testified at trial that Lyman Moore was present at the tavern and that they had a conversation (R. 578-579) in the course of which Moore said that it was "open season on bartenders" (R. 583) and that he had shot one in Lansing (R. 587). In laying the foundation for Sanders' relationship with Moore, the prosecutor asked Sanders whether he had known petitioner before that day. Sanders replied that he had, but that he couldn't estimate how long he had known Moore (R. 580). At the post-conviction hearing, defense counsel asked Virgle Sanders whether he had given the Lansing Police a signed statement that he had met Lyman Moore six months prior to the incident at the Ponderosa Tap. Sanders, who has a fourth grade education, said that he could not read the long hand statement (he can only read printed words) and that the six month period was only a "rough guess" (R.P.C. 124). In answer to further questioning, Sanders said, ". . . it could have been from two, three months to nine months. I don't know" (R.P.C. 125).

A second source of contention springing from Sanders' comments to the Lansing Police entails a confusion of identities between the petitioner and a man named "Slick." At the post-conviction hearing, Sanders admitted that the person whom he knew as Slick, and that he had met several months earlier, wore his hair differently (R.P.C. 134), was heavier and did not wear glasses (R.P.C. 130). Sanders, in answer to a leading question, said that if Lyman Moore was in prison at the time he first met "Slick," it would have been impossible for Lyman Moore and "Slick" to have been the same person (R.P.C. 132-133).

Notwithstanding this confusion of identities, it is the State's view that Virgle Sanders' murky recollections of a man named "Slick" are irrelevant to his positive identification of Lyman Moore as the man he knew and spoke with at the Ponderosa Tap. Sanders' statements are buttressed by the testimony of two other men who saw him speak to Lyman Moore at the Ponderosa.[6] The first, William Joyce, was the bartender at the Ponderosa on that day (R. 552, 554-555). He testified that he served several drinks to Virgle Sanders and Lyman Moore, and observed them talking (R. 561-562, 564). Joyce also said that Moore asked him for a ride (R. 562). Joyce accommodated Moore by arranging for a ride with Robert Fair, the owner of the tavern and the second man to observe Lyman Moore speaking with Virgle Sanders (R. 562, 564, 600-602). Fair drove Lyman Moore and his companion to Harvey, Illinois (R. 602-604). In the course of the automobile trip to Harvey Fair heard one of them say, "Well, if we hadn't had that trouble with the bartender in Lansing, we'd have been all right" (R. 606).

Thus, Virgle Sanders' confusion of identities between the petitioner and the ubiquitous "Slick" and when he first met him, is scarcely material to the facts established. The proof that Lyman Moore and Virgle Sanders met and spoke together at the Ponderosa is overwhelming.

The same could be said of all the State's evidence. In addition to the two eyewitnesses who saw the petitioner kill the bartender, a third witness stated that he heard Moore brag about the murder. Any further question

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6. It is relevant to note that neither of these two men were called as witnesses by defense counsel at the post-conviction hearing.

about Moore's identity is dispelled by two more witnesses who saw him speaking to Sanders at the time and place in question. The capstone is found in the off-hand admission made in Fair's automobile.

Petitioner contends that State witness Henley Powell perjured himself when he testified that he saw Moore enter the tavern and shoot the deceased; that Officer Koppitz's diagram of the premises, which did not come to light until after the trial, somehow proves that Powell was not facing the front door but was seated at a card table facing in the other direction and could not have seen what he testified to seeing. Petitioner engages us in this exercise in an effort to enhance the credibility of defense witness Donald O'Brian who was also seated at the card table and testified that Moore was not the man ejected from the tavern. (O'Brian, it will be remembered, was drunk and did not see the actual shooting). Completely overlooked in petitioner's commentary on Powell's veracity and the importance of the "suppressed" diagram is the actual testimony of Mr. Powell.

At the time of the murder he was playing pinochle with three other gentlemen (R. 536). His position at the table gave him a view of the bartender (R. 526). Because he could not bid in the game he laid his hand down and was looking toward the front door when Moore walked in (R. 526, 536). After the shooting he chased Moore but retreated when warned by petitioner that too might be shot (R. 529). As for the diagram, Officer Koppitz testified that it "tells which way the people were seated, not which way they were looking" (R.P.C. 273). The diagram discloses nothing that was not brought out in Powell's testimony at trial.

In affirming petitioner's conviction the Supreme Court of Illinois was in total harmony with constitutional standards for criminal discovery. In order to constitute a violation of due process, favorable evidence must be suppressed by the prosecution after it has been requested by the defense. Moreover, the evidence must be *material* either to guilt or to punishment. *Brady* v. *Maryland*, 373 U.S. 83 (1963). Certainly any of the items complained of here would not have disturbed the finding of guilt or the setting of the death penalty. The fact that two eyewitnesses successfully identified Moore as the killer has not been overcome.

Nor does the failure to produce any of the above items come within the constitutional prohibition against the knowing use of false evidence. *Miller* v. *Pate*, 386 U.S. 1 (1966). No false evidence was used against the defendant. Virgle Sanders' incorrect estimate of when he first met petitioner is not false evidence. He spoke the truth according to the best of his recollection. A mistaken belief is not perjury. Even if Sanders' miscalculation (or any of the other items complained of) could be characterized as "false evidence," they did not play a "vital part in the case for the prosecution" as required by *Miller* v. *Pate*.

The Second Circuit has explored the various standards for reversal in cases of suppression in *United States* v. *Keogh*, 391 F. 2d 138 (2nd Cir. 1968). The court isolated three categories:

> (1) deliberate suppression in which the court includes "not merely a considered decision to suppress, taken for the very purpose of obstructing, but also a failure to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention" (pp. 146-147);

(2) suppression by the prosecution of evidence favorable to the accused upon request;

(3) and "where hindsight discloses that the defense could have put the evidence to not insignificant use" (p. 147).

In the court's view the first two situations present no difficulty. The third presents a problem. The court concludes that while in some instances relief should be granted, the standard of materiality must be considerably higher than the usual level of probity required for admissibility. The State subscribes to this analysis and suggests that in this case the evidence does not reach this high level of materiality.[7]

It has never been held that the prosecution's duty to disclose extends to all evidence possibly admissible and useful to the defense. Nor has it been established what specific degree of prejudice must be shown in order to warrant a new trial. The cases, however, indicate that insignificant items of unproduced information will not overturn a conviction. The evidence suppressed in *Giles* v. *Maryland*, 386 U.S. 66 (1967), is representative of the sort of withheld data which has produced reversals. In *Giles* the State suppressed evidence which would have severely discredited the prosecutrix in a rape case. The effect of the evidence would have been sufficient to show that the "victim" of the rape was blatantly promiscuous and had probably consented to relations with the defendants. Thus, the effect of the evidence in *Giles* and other cases along this line of decisions has been such as would have produced an acquittal or substantial reduction in sen-

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7. Compare United States ex rel Fein v. Deegan, 410 F. 2d 13, 20 (2d Cir. 1969), cert. den. 395 U.S. 935.

tence. Neither of these criteria have been met in the present case. To grant a reversal in the instant case would be an invitation to every defendant to search for inconsistencies in the investigator's files long after his conviction. The impact on our present system of criminal justice can only be imagined. The Eighth Circuit has pondered the implications in *Johnson* v. *Bennett*, 386 F. 2d 677, 680 (8th Cir. 1968):

> "[A]ll the Supreme Court cases setting aside convictions for want of due process by reason of the reception of false testimony are based upon the knowledge of the prosecutor that the testimony received is false or knowledge that material evidence has been suppressed. Such would appear to be a proper limitation to the rule. If convictions could be set aside years after they become final merely upon proof that some testimony of a witness proved to be false, there would be no finality to convictions and the orderly administration of justice would be unduly hampered."

In addition to these policy considerations, there remains the simple fact that a fair trial was not denied the petitioner, and no knowing suppression of material evidence took place.

II.

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE ADMISSION INTO EVIDENCE OF A SAWED-OFF SIXTEEN GAUGE SHOTGUN.

The petitioner here claims that it was error to admit into evidence a sawed-off sixteen gauge shotgun on the premise that the deceased was killed with a twelve gauge shotgun.

It is a well established principle in Illinois[8] and elsewhere[9] that circumstances of the arrest may be brought before the jury. Here shots were fired and the police saw men fleeing from a car (R. 623-624). Petitioner was later arrested entering the very same car (R. 682). In the back seat of the car was a loaded sixteen gauge shotgun (R. 630-641).

The Illinois rule is stated in *People* v. *Smith*, 413 Ill. 218, 221, 108 N.E. 2d 596, 597 (1952), where it is said:

> "[W]eapons found in a defendant's possession or control at the time of his arrest on a murder charge may be the subject of testimony pertaining to the details of the arrest."

Thus, the shotgun was admissible purely on the ground that is was clearly in constructive possession of those arrested.[10] It was also admissible on independent grounds of relevance. The only evidence in the record as to the weapon in the crime was medical testimony that a shotgun was used. The witness, however, stated that he did not know what size shotgun was involved (R. 573). The only other evidence was a stipulation offered by the defense at the conclusion of their case that if a certain

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8. E.g. People v. Wright, 30 Ill. 2d 519, 198 N.E. 2d 316 (1964); People v. Jackson, 9 Ill. 2d 484, 138 N.E. 2d 528 (1956); People v. Trice, 127 Ill. App. 2d 310, 262 N.E. 2d 276 (1970).

9. E.g. People v. Beltowski, 71 Cal. App. 2d 18, 162 P. 2d 59 (1945); Chase v. State, 415 P. 2d 203 (Okl. Cr. 1966).

10. Concerning petitioner's previous relationship with the sixteen gauge sawed-off shotgun see People v. Moore, 35 Ill. 2d 399, 220 N.E. 2d 443 (1966), cert den. 389 U.S. 861.

police technician was called he would testify that in his opinion a twelve gauge shotgun was used (R. 853). Hence, no conclusive proof was ever adduced to show what gauge shotgun was used to execute Bernie Zitek.

The general rule has always held that is is proper to admit into evidence any weapon found within the defendant's control, suitable for the commission of the crime charged, even though there is no showing that it is the actual weapon used.[11] Thus, in the case of *People* v. *Lenhardt*, 340 Ill. 538, 549, 173 N.E. 155 (1930), the Supreme Court of Illinois said:

> "It is competent to prove that an accused person, when arrested, possessed a weapon suitable for the commission of the crime charged against him, even though no claim is made that he actually used it in committing the particular crime."

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11. E.g. Shiflett v. State, 38 Ala. App. 662, 93 So. 2d 523 (1957); People v. Lane, 56 Cal. 2d 773, 366 P. 2d 57, 16 Cal. Rptr. 801 (1961); People v. Nichols, 171 Cal. App. 2d 320, 340 P. 2d 727 (1959); People v. Nelson, 224 Cal. App. 2d 238, 36 Cal. Rptr. 385 (1964); People v. Lindsay, 227 Cal. App. 2d 82, 38 Cal Rptr. 755 (1964); State v. Dillon, 161 N.W. 2d 738 (Iowa 1968); State v. Ricks, 242 La. 823, 138 So. 2d 589 (1962); People v. Magby, 37 Ill. 2d 197, 226 N.E. 2d 33 (1967); People v. Johnson, 35 Ill. 2d 516, 221 N.E. 2d 497 (1966); People v. Trice, 127 Ill. App. 2d 310, 262 N.E. 2d 276 (1970); Strickland v. State, 226 Ga. 750, 177 S.E. 2d 238 (1970); People v. Hall, 19 Mich. App. 95, 172 N.W. 2d 473 (1969); People v. Lumpkin, 27 Mich. App. 143, 183 N.W. 2d 384 (1971); Garton v. State, 454 S.W. 2d 522 (1970); Harris v. State, 450 P. 2d 857 (Okl. Cr. 1969); State v. Peele, 75 Wash. 2d 28, 448 P. 2d 923 (1968); Pryor v. State, 449 S.W. 2d 482 (Tex. Crim. 1969).

The foundation for this rule of evidence is easily understandable. Most cases ultimately turn on the conclusions reached by the finder of fact. In many cases physical evidence is adduced which is related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. Such evidence does not usurp the province of the jury, since the jury does not have to accept the witness' opinion. *Miller* v. *Pillsbury,* 33 Ill. 2d 514, 516, 211 N.E. 2d 733 (1967). Illinois courts have not abandoned the principle that such opinion evidence should be received with caution. *Thomas* v. *Cagwin,* 43 Ill. App. 2d 336, 193 N.E. 2d 233 (1963). There is always the possibility that a given expert in the field of weaponry is simply wrong in his deductions. And in this case the witness' expertise was not established in the record. It is, therefore, quite understandable why Illinois courts will permit the introduction of a weapon found within a suspect's control at the time of his arrest which is suitable for the commission of the crime charged, even though no claim is made that he actually used it on the occasion in question. Accordingly, in the case of *People* v. *Ostrand,* 35 Ill. 2d 520, 221 N.E. 2d 499 (1966), a "snub-nose" revolver was used in a robbery. A larger revolver was found on the defendant at the time of his arrest and admitted into evidence. It was held that such a discrepancy goes only to the weight of the evidence and not the admissibility. In the instant case there is a diminutive amount of evidence in the record to establish the size of the shotgun used in the murder. It is entirely possible that the weapon found in the petitioner's possession could have been the murder weapon. There can be no doubt that the shotgun found at the time of petitioner's arrest was similar to the murder

weapon and was, therefore, properly admitted into evidence.[12]

For these reasons it is apparent that the weapon was not used against the petitioner to denounce him as a "bad man" without regard to his guilt or innocence. It is a well established rule that evidence of prior crimes cannot be introduced when it has no purpose other than to show criminal disposition. *Spencer* v. *Texas*, 385 U.S. 554 (1961). There are, however, numerous instances where evidence of prior crimes is admissible. In such cases the probative value of the evidence outweighs the possible prejudicial effect on the jury. Here, there was a distinct possibility that the shotgun in evidence was the very same gun that killed the bartender. Moreover, ready access to a loaded shotgun could be considered a part of the petitioner's modus operandi.[13]

It is clear that the "other crime," when it is found to be independently relevant and admissible, need not be established beyond a reasonable doubt, either as to its commission or as to the defendant's connection therewith. 1 Wharton, Criminal Evidence, § 366 (11th ed. 1935). The decision as to whether the logical relevance of the gun counterbalances any improperly damaging effect on the petitioner was with the trial court. Here, the

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12. Indeed, there is authority which would permit the introduction of the weapon merely for illustrative purposes. See People v. Aguirre, 158 Cal. App. 2d 304, 322 P. 2d 478 (1958), and cases collected in State v. Mays, 7 Ariz. App. 90, 436 P. 2d 482 (1968).

13. Petitioner and his companion Barbee used the same sixteen gauge shotgun in a July 27, 1962 armed robbery. People v. Moore, 35 Ill. 2d 399, 220 N.E. 2d 443 (1966), cert. den. 389 U.S. 861.

possibility that the shotgun could have been the murder weapon, plus its distinctive character tending to show a modus operandi,[14] combine to establish a high degree of relevancy. In the instant case the trial judge clearly acted within his permissible discretion in affirmatively weighing the actual need for the admission of the shotgun in the light of the issues and the evidence.

III.

THE SELECTION OF THE JURY IN THIS CASE DID NOT VIOLATE THE CONSTITUTION NOR DID IT AFFECT ANY SUBSTANTIAL RIGHT OF THE PETITIONER.

A.

The Opinion In Witherspoon v. Illinois Should Be Clarified Or Reconsidered.

On June 3, 1968, this Court rendered its opinion in *Witherspoon* v. *Illinois,* 391 U.S. 510, and gave that decision full retroactive application. Since that date, a significant number of problems have arisen from the attempts of the various states to interpret and to implement the decision. Both the importance of these problems and their multiplicity indicate a critical need for a clarification or a reconsideration by this Court of the holding in *Witherspoon.*

For example, experience with the *Witherspoon* rule has shown that its application probably worsens the posi-

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14. See People v. Sheets, 251 Cal. App. 2d 759, 59 Cal. Rptr. 777 (1967); Shiflett v. State, 38 Ala. App. 662, 93 So. 2d 523, 525 (1957).

tion of the defendant in a capital case. In discussions with prosecutors throughout the country and in our own experience, we have found that nearly every person who disqualified himself under the pre-*Witherspoon* standards will also disqualify himself under the post-*Witherspoon* standards. The few jurors who do not so disqualify themselves can invariably be eliminated by peremptory challenges.

Thus, the defense gains no real advantage if *Witherspoon* is followed. The prosecution, however, does gain an advantage and that advantage becomes apparent to anyone who watches a post-*Witherspoon voir dire*.

First, a number of jurors in pre-*Witherspoon* days who qualified for service because of the statement that they lacked scruples will now disqualify themselves when asked about their willingness to consider actual imposition of the death penalty. In our experience there are more of such jurors than there are jurors who, while declaring the existence of scruples, will still state that they could consider imposition of the death penalty. In sum, the prosecution may well gain in the number of challenges for cause if *Witherspoon* is followed.

Second and far more important tactically than the gain in challenges for cause, is the increase in knowledge about the juror gained from a post-*Witherspoon voir dire*. When a lawyer or a judge asks the prospective juror if he has any conscientious scruples against the death penalty and the venireman answers that he does not, the prosecution has little to guide its judgment as to the true feelings of the juror. The juror might be opposed to capital punishment generally but without conscientious or religious scruples. Or the juror, while approving of the death penalty, might not be willing to

sign a capital verdict himself or might do so only in the rarest case. And experience has shown that there are a number of such jurors. For this reason defense counsel often objected to questioning of veniremen that descended from the levels of conscientious scruples and sought to determine the actual ability of a juror to return a capital verdict. The reasons for such objections were also grounded on the theory that repeated questioning of jurors "indoctrinated" them with respect to the death penalty.

Under *Witherspoon*, however, such questioning is not only permissible but required. And when the juror has answered three or four searching questions on his ability to consider the death penalty, the prosecution has a very good basis for judgment as to whether the juror would really return a capital verdict. The demeanor of the venireman and the manner in which he answers the *voir dire* will nearly always give the prosecution a clear guide as to whether it should exercise a peremptory challenge. Instead of the old, ineffective shot in the dark, the prosecution can make exceptionally effective use of its peremptory challenges in capital cases.[15]

The defense gains no similar benefit from insight into the venireman's real views. For it must exercise its peremptory challenges unaided by the challenge for cause which helps the prosecution eliminate jurors it finds undesirable.

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15. The application of Witherspoon in states where attorneys are not permitted to ask questions for the purpose of uncovering information useful only as a basis for exercising peremptory challenges is especially helpful to the prosecution.

In theory of course, the defense has a challenge for cause similar to that of the prosecution; it can have dismissed any venireman who would always vote for the death penalty no matter what the evidence.[16] But in fact, few if any jurors will take this position and the challenge is rarely appropriate.

Witherspoon, therefore, improves the prosecution's position in relation to impanelling a capital jury by (a) failing to reduce significantly the number of jurors excused for cause and (b) increasing the effective use of prosecution peremptory challenges and (c) according to some defense lawyers, enabling the prosecution to indoctrinate jurors concerning the death penalty.

Furthermore, the Court's decision to give retroactive application to its holding in *Witherspoon* has resulted in several procedural quagmires. The number of cases affected by *Witherspoon* and the array of state and federal precedents sustaining jury selections held improper by *Witherspoon* are more impressive than some similar arrays of prior decisions in areas where the court has limited its holding. See *Desist* v. *United States*, 394 U.S. 244 (1969). Of more importance are the procedural problems created by the enforcement of the decision in past cases. The Court failed to consider that State procedure will not always allow the easy separation of issues of guilt and punishment. In several States the absence of any procedure for resentencing has resulted in a complete reversal

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16. Eg. Stroud v. United States, 251 U.S. 380, 381 (1920); Turberville v. United States, 303 F. 2d 411, 421 (D.C. Cir. 1962). See United States v. Puff, 211 F. 2d 171, 182 (2nd Cir. 1954); People v. Hobbs, 35 Ill. 2d 263, 272, 220 N.E. 2d 469, 473-74 (1966).

and retrial of both guilt and punishment issues.[17] Nor did the Court consider the problem that arises where the *voir dire* of the jury is not recorded.[18] The Court did not deal with the question of waiver.[19]

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17. Ellison v. State, 432 S.W. 2d 955 (Tex. Crim. 1968); Ex parte Bryan, 434 S.W. 2d 123, 124-126 (Tex. Crim. 1968); State v. Spence, 274 N.C. 536, 164 S.E. 2d 593 (1968); State v. Turner, 253 La. 763, 220 So. 2d 67, 68-69 (1969) (cases on direct appeal); State v. Benjamin, 254 La. 49, 222 So. 2d 853, 854-55 (1969); See also Pa. Stat. Ann. Tit. 18 § 4701 (1963).

18. The problem is not a minor one. The usual provisions of State law require the recording of jury selection upon the request of either party. In response to Witherspoon it has been held that jury selection should be recorded in the future. Pittman v. State 434 S.W. 2d 352 (Tex. Crim. 1968). However, where the record was not kept for lack of request the challenge to jury selection procedures has been rejected. Joseph v. State, 442 S.W. 2d 397 (Tex. Crim. 1969); State v. Forcella, 52 N.J. 263, 245 A. 2d 181, 196 (1968); Gaddis v. Page, 455 P. 2d 699 (Okla. Cr. 1969). As an alternative, evidence or stipulation as to what transpired at the voir dire has been taken and the issue reached in that fashion. Lokos v. State, 221 So. 2d 689 (Ala. 1969). See also Brent v. White, 398 F. 2d 503 (5th Cir. 1968); Yates v. Breazdale, 402 F. 2d 113, 115 (5th Cir. 1968). The problem with the latter method is that a correct ruling on Witherspoon may require very exact rendering of the voir dire which is impossible without a verbatim transcript.

19. Seemingly if a ruling is retroactive in effect and the actions of a trial court in failing to follow it are violative of the defendant's rights, then the failure of the defendant to object should waive the violation. However, the question of waiver is not so simple. The Supreme Court of California has, in reversing convictions, been very solicitous of trial judges, explicitly absolving

These problems arose, at least partly, from the fact that the ground of decision in Witherspoon was not the ground argued by the parties.[20]

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them from blame for failing to see into the future. In re Anderson, 69 Cal. 2d 613, 447 P. 2d 117, 120-123 (1968); In re Arguello, 71 Cal. 2d 13, 452 P. 2d 921 (1969); In re Seiterle, 71 Cal. 2d 698, 456 P. 2d 129 (1969); People v. Gardner, 71 Cal. 2d 843, 457 P. 2d 575 (1969); People v. Washington, 71 Cal. 2d 1061, 458 P. 2d 479 (1969); In re Hill, 71 Cal. 2d 997, 458 P. 2d 449 (1969); see also State v. Turner, 253 La. 763, 220 So. 2d 67 (1969).

However, the doctrine of waiver has been applied if something more than mere silence on the part of the defendant can be found in the record, i.e. specific agreement or stipulation to excuse a juror, or failure to ask questions to clarify the status of a juror's opinions. See People v. Coogler, 71 Cal. 2d 153, 454 P. 2d 686 (1969); State v. Pace, 80 N.M. 364, 456 P. 2d 197, 199-202 (1969); Pittman v. State, 434 S.W. 2d 352 (Tex. Crim. 1968); Scott v. State, 434 S.W. 2d 678 (Tex Crim. 1968).

In two cases defendants sought affirmance of their convictions and death sentences and the California Supreme Court ignored their requests since death penalty appeals are automatic in California. See People v. Goodridge, 70 Cal. 2d 824, 452 P. 2d 637 (1969); People v. Stanworth, 71 Cal. 2d 820, 457 P. 2d 889 (1969). Parenthetically, it seems that any statute which would prevent a man from waiving his appeal even if it results in his death is itself unconstitutional. Cf. In re Brooks Estate, 32 Ill. 2d 361, 205 N.E., 2d 435 (1965). (Jehovah's Witness has a constitutional right to refuse medical treatment even if such refusal would result in her death).

20. In state court, Witherspoon argued that disqualification of jurors with conscientious scruples against the death penalty caused him to be tried before a jury unable to determine fairly his guilt or innocence. He did not challenge the fairness of the jury on the issue of

The Court failed to reach the issue of the jury's fairness on the guilt—innocence question because "the data adduced are too tentative and fragmentary." (391 U.S. at 517). Yet the conclusion as to the jury's impartiality on the issue of punishment was reached with no data at all because it was "self-evident." Perhaps with adequate briefing the Court would have abandoned its holding or would at least have found some basis more substantial for its proposition than that it was "self-evident".

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punishment. His argument was that the legitimate interest of the State is securing a fair jury on the issue of punishment should not prejudice his right to a fair jury on guilt or innocence. He offered studies concluding that jurors without conscientious scruples were "prosecution prone" on the issue of guilt or innocence. The Supreme Court of Illinois affirmed the denial of relief. People v. Witherspoon, 36 Ill. 2d 471, 224 N.E. 2d 259 (1967).

Witherspoon then sought certiorari raising several questions but failing again to challenge the fairness of the jury on the issue of punishment. This Court granted certiorari but limited to considering whether the jury selection process "assured the State of a jury whose members were partial to the prosecution on the issue of guilt or innocence in violation of the petitioner's rights under the Sixth and Fourteenth Amendments to the United States Constitution." (Emphasis added). 389 U.S. 1035 (1968). This language was echoed in the grant of certiorari in a companion case. *Bumper* v. *North Carolina*, 389 U.S. 1034 (1968).

However, when Witherspoon filed his brief he raised, for the first time in a brief passage, the question of the jury on the issue of punishment. Yet he still did not ask for a vacation of sentence—only for a new trial. The prosecution, noting that the question was not properly before the court, stated that it would not reply to the argument unless requested to do so. See Brief for Respondent Woods, Witherspoon, v. Illinois pp 37-38.

The lack of argument had a devastating effect on the quality and clarity of the decision and it is this that the passage of time has revealed most clearly.[21]

The most immediate problem arising from the lack of argument on the issue decided was a severe lack of focus in the holding. It is difficult to state with assurance the holding of the case. The text of the opinion and one footnote offer at least three separate standards for jury selection in capital cases.[22]

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21. The Court relied, for example, on a Gallup Poll of 1966 to show that persons favoring capital punishment were a "distinct and dwindling minority." To-wit, 42%. (391 U.S. at 520, n. 16). Yet the same poll showed that persons without scruples against inflicting capital punishment constituted 65% of the population. This latter figure is the more meaningful since jurors were not asked if they favored capital punishment; rather they were asked if they had scruples against its infliction. In any event, polls are hardly a good basis for lasting doctrine. According to Gallup the number of persons favoring capital punishment "dwindled" from 42% in 1966 to 51% in 1969. (Gallup Poll Report, February 16, 1969). In a recent referendum, conducted in concert with a vote on whether to adopt a new state constitution, the voters of Illinois rejected a ballot proposition to abolish capital punishment. 64.3% of those voting favored retaining capital punishment while only 35.7% opted for abolition. Just under 2,000,000 votes were cast on the proposition. [Illinois Secretary of State, Constitution of the State of Illinois and United States 13, 15 (1971)]. To whatever extent Witherspoon relied on polls, it has been proven to rest on an insufficient foundation.

22. In the text of the opinion the Court said:

> "Specifically, we held that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for

What then is the holding? Is it the somewhat flexible minimum standard in the text? Is it the standard of the footnote, i.e., willingness to consider all the penalities?

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cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (391 U.S. 510, 521-22)

However, in a long footnote to this statement the Court said:

> "Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." (391 U.S. 510, 522 n. 21)

And in the second paragraph of this same footnote the Court added:

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause

What is the meaning of the second paragraph of the footnote which lays down a very rigid standard but provides that "nothing we say today bears upon" the application of this standard?

In *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968), a companion case decided the same day with opinion written by the same Justice as in *Witherspoon*, the Court said:

> "In *Witherspoon* v. *Illinois* * * * we have held that a death sentence cannot constitutionally be executed if imposed by a jury from which have been excluded for cause those, who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty."

The ambiguity in the holding is clearly illustrated in the following passage from *Witherspoon*:

> "If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, *it could argue* that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all

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were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case." (391 U.S. 522-523).

who opposed it in principle, the State crossed the line of neutrality." (391 U.S. 510, 520, emphasis added).

What kind of exclusion of jurors is permitted? What kind is prohibited? What standards were approved? What standards were disapproved? What did the Court decide? Except in certain cases at the ends of the spectrum the answers to these questions are not known.[23]

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23. The California experience is particularly illustrative of the confusion generated by lack of focus in the Witherspoon opinion.

The Supreme Court of California has ruled on the applicability of Witherspoon in numerous reported opinions. The court has stated the applicable test in terms of the second paragraph of footnote 21 i.e., it must be unmistakably clear that the juror would automatically vote against the death penalty regardless of the evidence or that the juror's attitude toward the penalty would prevent an impartial decision on the defendant's guilt. E. G. In re Anderson, 69 Cal. 2d 638, 447 P. 2d 117, 120-23 (1968); People v. Washington, 71 Cal. 2d 1170, 459 P. 2d 259, 264-65 (1969). But even this clear choice of standard has not avoided serious problems.

The most obvious of these problems is that jurors often do not make unmistakably clear answers to questions on voir dire. This tendency to give equivocal answers is increased substantially when questioning becomes extensive and probing. The net result of an attempt to apply a rigid standard to an inherently equivocal sort of proceeding is a course of basically inconsistent decisions. In other words, it is difficult to tell why or how the Supreme Court of California differentiates between the cases it affirms and those it reverses.

For example, in a series of cases the Court disapproved excusing a juror despite the fact that a juror "believes"

The Court did not deal with the effect of peremptory challenges on jury selection in capital cases. Certainly the Court did not overrule its long standing doctrine that peremptory challenges are a matter for each party to exercise as it sees fit. *Swain* v. *Alabama*, 380 U.S. 202, 221-222 (1965). Presumably the prosecution could exer-

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or "really feels" he could not consider the death penalty, (People v. Vaughn, 71 Cal. 2d 406, 455 P. 2d 122, 125-28 (1969).) Or that a juror "did not think" he could assess the penalty, (People v. Osuna, 70 Cal. 2d 811, 452 P. 2d 678 (1969).) Or that a juror said "I don't think I could send anyone to death", (In re Hillery, 71 Cal. 2d 857, 457 P. 2d 565, 566-70 (1969).) Or that a juror said "I cannot serve on a capital punishment case" (People v. Goodridge, 70 Cal. 2d 824, 452 P. 2d 637, 646-7 (1969). Or that a juror did not "believe" or "think" he could give the death penalty under any circumstances. (People v. Washington, 71 Cal. 2d 1061, 458 P. 2d 479 (1969).)

On the other hand, the California Court has affirmed the excusing of jurors who said they "would rather not serve" or "I'm afraid I would [feel compelled to vote for life imprisonment]" or "I don't think I could consider it" or "I feel I couldn't" or "I don't believe I could." People v. Mabry, 71 Cal. 2d 430, 455 P. 2d 759, 767-70 (1969). In another case the court sustained a challenge to jurors who said "I believe that is my feeling" and "I don't think I would in conscience impose the death penalty." People v. Hill, 70 Cal. 2d 678, 452 P. 2d 329, 341-42 (1969). In a third case a juror whose answers shifted from "possibly could" to "could not" was finally excused when he said he answered affirmatively to the proposition that no matter what the case was, he could not, in good conscience, vote for the death penalty. People v. Robles, 71 Cal. 2d 924, 458 P. 2d 67 (1969). These decisions simply cannot be subjected to a simple, reasonable analysis explaining the difference in results.

cise its peremptory challenges to eliminate scrupled jurors who could still return a death penalty verdict. And presumably the prosecution would always choose to exercise its challenges with respect to such jurors. Yet this important question is unanswered by *Witherspoon*.[24]

In short, the Court ought to reconsider or clarify its decision in *Witherspoon* in light of the effect of that decision on actual jury selection, in light of the problems created by retroactive application and in light of the serious problems in interpreting the decision.

B.

The Particular Voir Dire In This Case Was Not Conducted In Violation Of The Witherspoon Decision.

During the *voir dire* in the present case each venireman was asked in substance whether he had any religious or conscientious scruples against the infliction of the

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24. In the case at bar the State had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under Witherspoon. Since this was a capital case each side had 20 peremptory challenges under the applicable Illinois statute: Ill. Rev. Stat. 1963, Chap. 38, par. 115-4 (e). None of the State's peremptory challenges was exercised against veniremen who were totally opposed to capital punishment. Notwithstanding this fact the State failed to exhaust all of its peremptory challenges at the close of the examination. If defense counsel had elected to question further and had been able to elicit from a few challenged veniremen the response that despite their religious or philosophical principles they might be able to sign a death verdict, the composition of the jury would have been no different in respect to its propensity to invoke the death penalty.

death penalty in the proper case. In the context of the entire *voir dire*, including the trial court's efforts to determine whether the jurors would consider all possible verdicts, it cannot be said that there had been removed from the jury "for cause those who, without more, are opposed to capital punishment or have conscientious scruples against imposing the death penalty." *Bumper* v. *North Carolina*, 391 U.S. 543, 545 (1968). Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by petitioner.

The general course of the examination, however, was unlike *Witherspoon* where the trial judge promptly removed all who voiced the slightest disdain for the death penalty. The effort of the trial court to select a fair and impartial jury is reflected in the examination of prospective juror Conner:

> "The Court: Q. Did you say Mr. Conner, that if you determine first, that the defendant is guilty and then you are to determine whether you should render a verdict of death that you couldn't consider that?
>
> A. I said that I was one hundred percent for punishment, but if a man has to take another life to punish him, then I don't feel that I could be justified in taking it.
>
> Q. In other words, you don't believe in capital punishment?
>
> A. If that's what it amounts to.
>
> Q. No, no. I'm asking you. I asked you, did you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?
>
> A. In a proper case, no, I don't have any objections and I could sign a death penalty in a proper case.

The Court: Well, I'm not going to remove him." (R. 145).

Another example is the following examination of prospective juror Nakata:

"Q. Likewise, you can't be a juror unless you, when you're sworn, and you are sworn to respect and observe the law.

A. That's the reason why I would like to give my reasoning right now, before I perjure myself about that personally, because I can't go all the way on capital punishment.

Q. You can't go all the way?

A. No.

Q. Where do you stop?

A. It depends on the kind of crime it is and the evidence presented for it.

Q. Oh, that's all we are asking you to do.

A. Well, it seems to me, from the statements made by the prosecuting attorney, that he is going to ask for the death penalty, so in view of that fact, I think I should disqualify myself.

Q. If he asks for it, it doesn't mean that you have to give it to him.

A. Of course, that's true, too. But at the same time, though, I mean, I wouldn't be applying the law, as he stated it, you see, upon his presentation of the evidence, and all that, so I don't think I would be fair to the court or to the rest of the jurors by my being on the jury.

The Court: Step down, then, if you don't think you can be fair. I'm not going to ask you to try any further. The only question is, we want you to be fair and impartial." (R. 227-229)

It is the State's understanding of the *Witherspoon* doctrine that the exclusion of jurors with scruples against

capital punishment does not necessarily void the infliction of the death penalty. The tenor of the *voir dire* examination here was quite different from that of the *Witherspoon* court. In that case the tone was set early in the *voir dire* when the trial judge said, "Let's get these conscientious objectors out of the way without wasting any time on them." In this case, there was no hint of a desire to be unduly rash in selecting the jury. To the contrary, the mood of the proceedings here indicated a sincere desire to determine the jurors' qualifications. The fact that the questioning became more abbreviated as the examination progressed indicates merely an increase in efficiency, not a sellout to haste.

Furthermore, in the context of the *voir dire* it is clear that the veniremen were cognizant of the import of the question. In Illinois, as in most jurisdictions, the entire venire is present in the courtroom while the indivdual jurors are questioned. The venire is brought into the courtroom and given preliminary instructions concerning the nature of the case and the trial procedure. The veniremen are then sworn as a group. After the colloquy between the trial court and venireman Connor (R. 145) (who was the second venireman examined) no prospective juror could have been in doubt as to what was meant by conscientious or religious scruples against inflicting the death penalty. The trial court made it clear that it was concerned only with persons who would not render the death penalty under any circumstances; and such persons may be excused for cause under *Witherspoon*.

CONCLUSION

For the foregoing reasons, Respondent requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

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